



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, 1981, S.O. 1981, c.53, as amended;

AND IN THE MATTER OF the Complaint of Edwin Roberts dated March 30, 1987, alleging discrimination in employment on the basis of service.

B E T W E E N :

Edwin Roberts

Complainant

- and -

Her Majesty the Queen in Right of Ontario
(Ministry of Health)

Respondent

DECISION

Date : July 4, 1995
Adjudicator : Professor Constance Backhouse
File No. : 88-0022
Decision No. : 95-032

Board of Inquiry (*Human Rights Code*)
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AWARD OF DAMAGES

In August of 1986, Mr. Edwin Roberts, the complainant, applied to the Ministry of Health's Assistive Devices Program for financial assistance towards the cost of a closed circuit TV (CCTV) magnifier. Mr. Roberts is legally blind, but with the aid of this device he was able to read, write and view pictures. His physicians had advised him to obtain a CCTV, which cost approximately \$3,000. The Ministry of Health, the respondent, denied Mr. Robert's request, advising him that financial assistance for the purchase of this device was restricted to persons born after 1 July 1963. Since Mr. Roberts was 73 years of age at the time of his application, he was ineligible.

Mr. Roberts brought a complaint under the Human Rights Code on 30 March 1987, alleging discrimination on the basis of age. The complaint was dismissed by this board of inquiry in April 1989, a decision which was upheld by the Divisional Court on 18 December 1990. The case was appealed to the Ontario Court of Appeal, which ruled in favour of Mr. Roberts (Finlayson, J.A. dissenting) in a decision rendered on 16 August 1994. [See Roberts v. Ontario (Minister of Health) (1994), 117 D.L.R. (4th) 297.] In addition to issuing an order striking out the applicable age restriction in the Ministry of Health's Assistive Devices Program, the Court of Appeal referred the matter of Mr. Roberts' damages to this board for resolution.

The parties were able to settle two of the issues at the outset between themselves: 1) reimbursement for the cost of the CCTV monitor, plus interest from the date of purchase; 2) \$15,000 for legal costs. The parties were unable to agree on the quantum of general damages, with the complainant seeking \$10,000, and the respondent arguing that an award in the range of \$4,000 would be more appropriate. Consequently, it is the task of this board to render a decision regarding the quantum of general damages.

Section 41(1)(b) of the Code provides:

(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order, (...)

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award not exceeding \$10,000, for mental anguish.

The purpose of compensation under human rights legislation is to put the complainant in the position he or she would have been in, as far as is reasonably possible, had the discriminatory conduct not occurred. Boards of inquiry have interpreted s.41(1)(b) to mean that general damages under the Code can be based upon two separate branches: i) monetary compensation for loss arising out of the infringement; and ii) monetary compensation not exceeding \$10,000 for mental anguish where the infringement has been engaged in wilfully or recklessly. (See Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) at D/2199; Lampman v. Photoflair Ltd. (1992), 18 C.H.R.R. D/196 (Ont. Bd. Inq.) at D/211-212; Parks v. Christian Horizons (No. 2) (1992), 16 C.H.R.R. D/171 at D/173; Cunningham v. Royal Canadian Legion Branch 594 (1993), 20 C.H.R.R. D/239 (Ont. Bd. Inq.) at D/245.)

I. The First Branch

The first branch of damages under s.41(1)(b) of the Code relates to losses arising out of the infringement of the complainant's rights. The purpose of this head of damages is to compensate for the injury to the intrinsic value of the right to be free from discrimination. General damages awarded under this branch should reflect the loss of the particular human right itself, independent of actual monetary or personal losses suffered. In order to meet the broad policy objectives under the Code, damages under this heading ought to provide for true compensation, not just minimal recompense, and there ought to be a presumption in favour of making an award of this nature. [See Cameron v. Nel-Gor (*supra*); Ghosh v. Domglas Inc. (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) at D/232-4.]

Boards of inquiry have come increasingly to recognize that awards for general damages in past cases have been too small. Indeed, some have expressed concern that the low amounts ordered in earlier cases may have trivialized the principles underlying the Code, and that such awards may even have operated as some sort of "license fee" to discriminate. [See Underwood v. Board of Commissioners of Police of Smiths Falls (1985), 7 C.H.R.R. D/3176 (Ont. Bd. Inq.) at D/3182-D/3185; Morgoch v. Ottawa (City) (No. 2) (1989), 11 C.H.R.R. D/80 (Ont. Bd. Inq.) at D/93.] It is vitally important to ensure that general damage awards are sufficiently substantial that they reflect the magnitude of the injury sustained.

Mr. Roberts testified that he experienced significant emotional injury from the respondent's refusal to provide financial assistance for the purchase of the visual device. He described a gamut of painful emotions, explaining that he felt at turns: "depressed," "despised," "downhearted," and "rejected." The Ontario Court of Appeal summed up the nature of the injury in a succinct phrase, noting that the respondent's policy implied "that because Roberts is over 30 he is somehow less deserving of the life he otherwise could have." (at p.401.)

The length of time it has taken to resolve this case is an additional factor to be considered. These proceedings have covered the course of a full decade. It is important that an award of general damages reflect the extent of the injury, and the length of time over which the complainant experienced the abrogation of his or her rights will factor into the assessment of the severity of the harm. Counsel for the respondent took issue with including delay as a factor relevant to the assessment of general damages. In this connection, he cited the case of Leshner v. Ontario (No. 2) (1992), 16 C.H.R.R. D/184 at D/210, in which the majority of the board of inquiry concluded:

Finally, Mr. Leshner argues that the uncertainty he has endured because of the length of time of his unresolved claim should entitle him to compensation. Section 41(1)(b) of the Code is not meant to compensate for society's laggardness in developing the law. There would be few, if any, jurisdictions in the world that are more in the vanguard of advancing human rights than Canadian jurisdictions. The progress toward achieving perfection involves a wear and tear for all members of society.

This conclusion regarding delay and damages is not one with which I agree. The enforcement of the Code is primarily complaint-driven. We rely upon the energy, effort, resources and time of complainants to initiate the process and carry it through to finality. All who participate in this process attest to extraordinary anxiety, frustration, exhaustion and depletion in its wake. This is not something that should be minimized, swept aside, or considered irrelevant when it comes to assessing damages upon a successful complaint. Mr. Roberts suffered continuing harm over a ten year period. He has endured an extensive investigatory and conciliation phase before the Commission, and three separate litigation phases of this action. In his effort to pursue his rights to be free from age discrimination, he has aged ten full years in this contest. The delay inherent in this protracted litigation should surely be factored into the quantum of damages for the assessment of the actual injury endured.

Counsel for the complainant argued that the award of general damages ought to be larger because it was a government ministry which was responsible for violating the Code. In Underwood (supra), the board noted:

Moreover, the injury he has suffered is made more serious, as counsel for the commission argued, by the discrimination having been practised by a public body whose judgments are bound to be more publicized, and far more likely to be assumed by the public to be sound, than would those of a private organization.
[at D/3183.]

With respect, this is not a position with which I concur. There is nothing in the Code itself which authorizes a two-tier system for assessing general damages: one for public authorities and the other for private individuals or organizations. The harmful impact of discriminatory activity by private entities may be as significant, at times even more significant, than the discriminatory actions of governmental bodies. I believe that it would incorrect to assess a quantum of compensatory damages which is larger solely because the respondent is a public body. In this respect, the quantum of damages must be assessed in each case on its own merits.

Finally, there was some brief argument as to whether age discrimination, as a category, might call for lower general damages than some other areas of violation under the Code. Counsel for the Commission protested vigorously any attempt to rank the grounds of discrimination under the Code, and counsel for the respondent did not seriously pursue this matter. In any event, I do not accept the argument.

Based on all of the evidence filed before me, the arguments raised by counsel, and my consideration of the provisions of the Code and the cases interpreting it, it is the decision of this board that general damages under the first branch of s.41(1)(b) should be assessed at \$7,000. Of this, \$2,000 represents the amount assessed as specifically attributed to the length of time it has taken to resolve this case.

II. The Second Branch

The second branch of the provisions under s.41(1)(b) refer to an additional head of damages, capped at \$10,000, where there is mental anguish and the conduct of the respondent has been wilful or reckless. There is no doubt that Mr. Roberts has experienced mental anguish. At issue is whether the respondent has behaved wilfully or recklessly within the meaning of the statute.

The leading case on this issue is Re York Condominium Corp. No. 216 and Dudnik (1991), 79 D.L.R. (4th) 161 (Ont. Div. Ct.). The board of inquiry in that case had concluded that "wilfully" meant "intentionally," "knowingly," or "deliberately." The Divisional Court disagreed:

To the extent that the Board appears to treat "wilfully" and "intentionally" as being synonymous I cannot agree. In my opinion, while the act upon which it is founded must be intentional, the infringement must be the purpose of that act in order to be wilful within the meaning of s.40(1)(b) [now s.41(1)(b).] [at p. 176.]

The board of inquiry in Lampman (*supra*) has suggested that "the Divisional Court in York Condominium...cannot have meant that the misconduct must be 'wilful' or 'reckless' in the sense that the actor is aware of the fact that his conduct constitutes a breach." [at D/212.] What exactly is meant by the phrase that "the infringement must be the purpose of that act," will require additional interpretation and application as the cases present themselves. However, this case appears to be one which falls within that test. The evidence indicates that Mr. Roberts made direct application to the then Minister of Health, Murray Elston, in his efforts to convince the respondent to drop the age restriction on its Assistive Devices Program. Mr. Elston replied to Mr. Roberts in a letter of 5 December 1986, in which he expressly acknowledged that people of all ages had need for visual aid devices. Claiming that the Ministry was committed to phasing in coverage to adults in the future, Mr. Elston nevertheless continued to deny Mr. Roberts access to financial assistance. The withholding of this benefit was described, by the Ontario Court of Appeal, as "an institutionalized policy," with a restrictive age criteria that was openly acknowledged by the respondent to be based on age and "discriminatory [in] nature." Furthermore, the Court of Appeal concluded that the "current selection process remains devoid

of rationale," and had the effect "of depriving those most affected by the...disadvantage from assistance." [at p. 401 and 404.]

Based on the findings of the Ontario Court of Appeal, it seems clear that the respondent's act meets the test set out in the second branch of s.41(1)(b) as conceptualized by the Divisional Court in York Condominium. Consequently, an award for mental anguish is also in order. An additional award of \$3,000 would be appropriate under the circumstances.

III. Interest

Counsel for the complainant also requested that interest be payable upon the award ordered. It was brought to my attention that the Divisional Court has recently ruled, in Impact Interiors Inc. and Ken Walia v. OHRC, Raj Anand (Board of Enquiry), Shirley Hom, and Cindy Petersen (10 May 1995, unreported) that "the Code does not provide for an award of interest." It is not clear from the decision whether the ruling is restricted to the particular facts of the case, in which no claim for interest was made in the complaints. The Divisional Court noted that it did not consider the analogy of the interest provisions in the Courts of Justice Act "to be telling in the circumstances of this case." [at p. 5.] I am also informed that leave to appeal the Divisional Court ruling is being sought.

Earlier cases appear to have awarded interest payable on awards of general damages as appropriate. In West End Construction Ltd. v. Ontario (Ministry of Labour) (1988), 9 C.H.R.R. D/4537 at D/4539, the Ontario Divisional Court expressly recognized the jurisdiction of a board of inquiry to make an award of interest, stating that the word "compensation" in s.19(b) of the 1980 Code could be interpreted to include interest. In Scott v. Foster Wheeler Ltd. (1986), 7 C.H.R.R. D/3193 at D/3195 (Ont. Bd. Inq.) the board noted that "recent decisions have awarded interest on the total special and general damages," and found that "the appropriate date to commence interest is the date of service of the complaint." This ruling was appealed in Foster Wheeler Ltd. v. Ontario Human Rights Commission (1987), 8 C.H.R.R. D/4179 (Supreme Court of Ontario, Divisional Court). There the Ontario Divisional Court reduced the compensation owing for the discrimination and adjusted the interest award accordingly, but did not take issue with the authority of a board of inquiry to award damages where appropriate. The endorsement of the record of the Ontario Divisional Court in Cameron v. Nel-Gor, dated 17 September 1985, dismissed an appeal from the ruling of Professor Cumming, as he then was, in which he had

ordered interest payable on an award of general damages. Leave to appeal was denied by the Court of Appeal on 25 November 1985.

The present case appears to be one in which it would be appropriate to order interest. However, it would be inappropriate in this particular case to award interest on the full amount of the damages. That portion of the award which is specifically designated to compensate for the delay in resolving this matter ought not to have interest attached. Accordingly, Mr. Roberts is entitled to interest only on \$8,000 of the award, payable from the date of service of the complaint. Interest should be calculated according to the Courts of Justice Act. Should the parties have any difficulty coming to a resolution of the amount owing in interest, this board will remain seized of the matter until agreement is finalized.

ORDER

This board of inquiry holds that the respondent should pay the following to the complainant for breach of his rights under the Code:

- a) for general damages, the amount of \$7,000; and
- b) for mental anguish, an additional amount of \$3,000.
- c) interest on \$8,000 of the above, payable from the date of service of the complaint, and calculated according to the Courts of Justice Act.

July 4, 1995

Date

C. Backhouse

Constance Backhouse
Chair, Board of Inquiry